no power under the Constitution to regulate matters which only remotely or incidentally affect interstate commerce, since action by it in such matters would not really be a regulation of interstate commerce. But if an act does really affect interstate commerce — whether directly or indirectly — it should be regarded as within the scope of the power of Congress. The constitutional question is not as to the manner in which commerce between the states is affected, but whether it is in reality affected at all.

The defendant tobacco companies relied much on *United States* v. *Knight*[5] as authorizing their actions under the court's present test. There, a combination of sugar refineries was held to be engaged in manufacturing only, not in interstate commerce, and hence not within the Act. However the effect of such a combination of interstate manufacturers is directly to restrain competition in the sale of the product outside the state. Furthermore later decisions of the Supreme Court insist that "the most innocent and constitutionally protected of acts . . . may be made a step in a criminal plot"[6] and that transactions in restraint of interstate commerce must be considered as a whole.[7] Therefore, while Congress has no power to regulate manufacturing,[8] it has power to regulate combinations of manufacturers formed to restrain interstate trade. Indeed, if commercial transactions are to be divided as in the Knight case into their integral parts, "Interstate Commerce" becomes restricted to transportation. But if they are to be considered as a whole, then the present combination, engaged in buying, manufacturing, and selling, seems on any test to be clearly within the Act.[9]

The Circuit Court of Appeals considered the Knight case as overruled. Only a year ago, however, the Supreme Court distinguished it from the case which the circuit court deems to have overruled it.[10] It is submitted that, although there is a clear enough distinction in the degree of directness with which interstate commerce is affected, yet in both these cases there was really a direct effect. Furthermore, in a late case[11] a sale of a transportation line engaged in interstate commerce with an agreement not to compete was held not within the Act, though the restraint operated directly on interstate commerce, and the fact that the restraint was collateral to the main purpose of the contract does not affect the result on interstate commerce. In the Northern Securities case[12] Mr. Justice Brewer returned to the test of reasonableness. The test of directness, in the ordinary sense of the word, unflinchingly applied, is the *reductio ad absurdum* of the Act. In view of its recent decisions the court cannot be so using the word. Is it saving the Act and returning to the test of reasonableness by considering "directly," as it has used the word, synonymous with "reasonably"?[13]

CONSTITUTIONALITY OF A STATUTE COMPELLING THE COLOR LINE IN PRIVATE SCHOOLS. — Mr. Justice Harlan, dissenting with one other justice

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[5] 156 U. S. 1.
[6] Aikens *v.* Mo., 195 U. S. 194, 206.
[7] Swift *v.* U. S., 196 U. S. 375, 396; Loewe *v.* Lawlor, 208 U. S. 274, 298.
[8] Kidd *v.* Pearson, 128 U. S. 1.
[9] County of Mobile *v.* Kimball, 102 U. S. 691, 702; Gloucester Ferry Co. *v.* Pa., 114 U. S. 196, 203.
[10] Loewe *v.* Lawlor, *supra.*
[11] Cincinnati Packet Co. *v.* Bay, 200 U. S. 179.
[12] 193 U. S. 197, 361. See 17 HARV. L. REV. 474, 478.
[13] *Cf.* 17 HARV. L. REV. 480.

from a recent decision of the Supreme Court, declares that a state law which forbids the joint education of white and colored persons in private schools violates the federal Constitution. *Berea College* v. *Commonwealth*, Nov. 9, 1908. The point is unsatisfactorily evaded by the majority, who hold the statute valid in the particular case as an amendment of a corporate charter. This conclusion involves questionable holdings as to the separability of legislation and the power to impair a corporate grant; the minority opinion on these points appears preferable. But had the main point been squarely met, it is believed that the same result would have been correct, and that herein the minority err.[1] The question is not one of race discrimination, since the statute affects white and black pupils alike; but simply whether the state has made such proper use of its police power that teachers and pupils, the freedom of whose action is thereby limited, cannot successfully invoke the fourteenth amendment.

Similar constitutional [2] and statutory [3] provisions have been construed only in cases concerning public schools.[4] It is settled that local officers of education may segregate the two races, provided they offer equal advantages to both;[5] but they cannot assume to fix the policy of the state by drawing the color line without express statutory sanction.[6] Such matters, however, of policy in the execution of a public function obviously present a different problem from the present.

No case with similar facts has been found; but the statutes prescribing "Jim Crow cars" raise an analogous point. The Supreme Court squarely held such legislation to be a valid exercise of the police power, Mr. Justice Harlan vigorously dissenting.[7] It may be thought that this case was easier, and the dissent more clearly mistaken, because the state has peculiar control over common carriers. On the other hand, the policy of the state in segregating the races may be said to have more justification in the principal case, since the experience of children in school has deeper relation to the morals and health of the community than the mere superficial contact of passengers in railroad cars. The state's right to prohibit miscegenation is unquestioned;[8] to prohibit joint education is not much more of a step. Mr. Justice Harlan alarmedly prophesies compulsory segregation in church, meeting-house, and market-place. The answer is that each case on the exercise of the police power will be decided according to its own facts, and will depend peculiarly little upon analogous precedents.[9]

THE CONSTITUTIONALITY OF STATUTORY COMMITMENT OF DEFENDANTS ACQUITTED OF CRIME BECAUSE OF INSANITY.— In a recent case the defendant was acquitted of homicide because of insanity at the time of the act. The court thereupon committed him to an asylum under a statute which provided for such commitment if in the opinion of the court

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1 Freund, Police Power, 718.
2 Const. W. Va., Art. xii, § 8.
3 *Cf.* Ga. Code, § 1378.
4 Martin *v.* Bd. of Education, 42 W. Va. 514.
5 Lehew *v.* Brummell, 103 Mo. 546.
6 Bd. of Education *v.* State, 45 Oh. St. 555.
7 Plessy *v.* Ferguson, 163 U. S. 537.
8 *Ex rel.* Hobbs, 1 Woods (U. S.) 537.
9 See Berea College *v.* Commonwealth, 29 Ky. L. Rep. 284.